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QUEEN'S BENCH

APPEALS FROM

THE HARBOUR COMMISSIONERS OF
MONTREAL,

(Pursuant to the Court Order)

Sheweth

ANDREW MCLELLAN,

(Respondent to the Court Order)

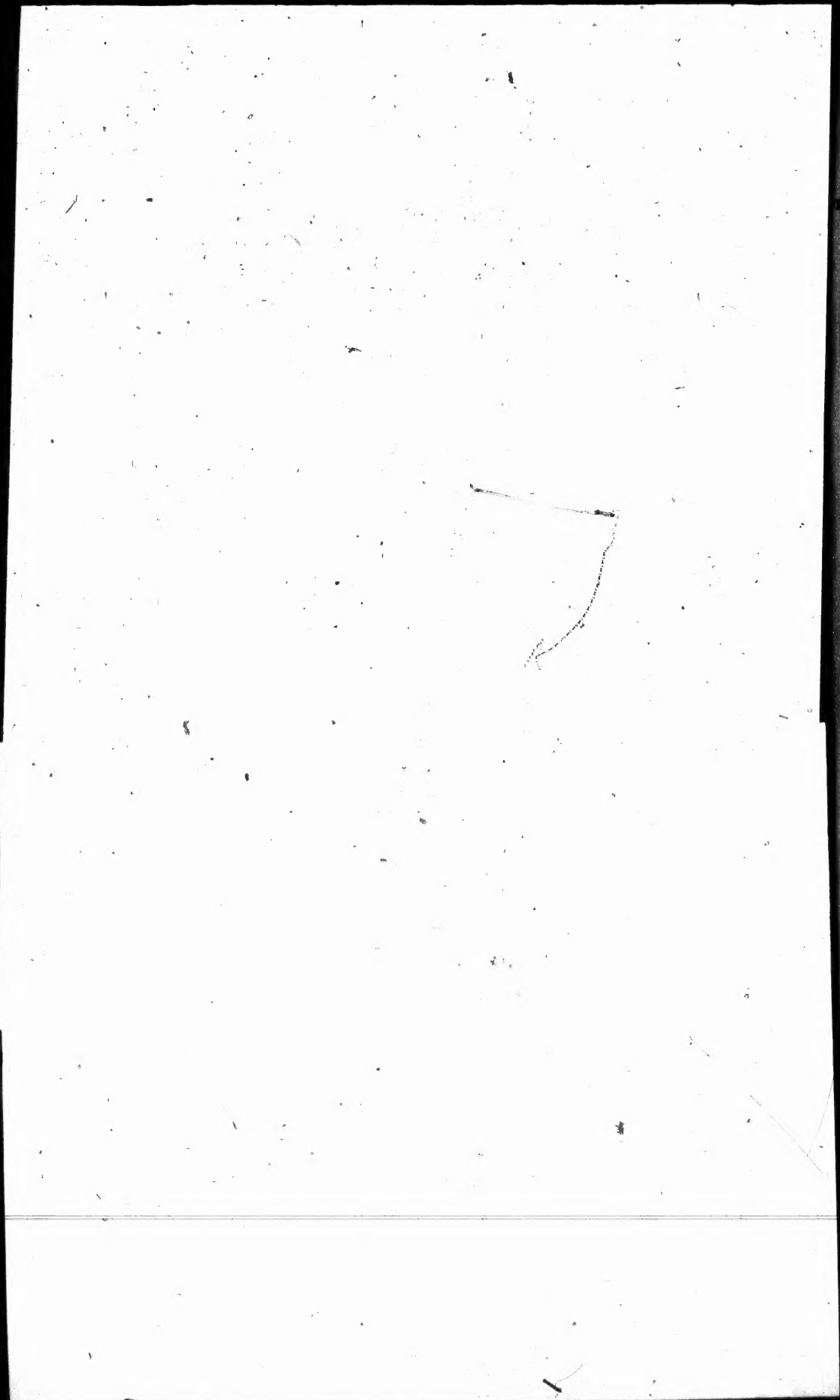
Sheweth

ANDREW MCLELLAN,

Plaintiff

A. & W. MCLELLAN,
Agents for Respondent.

2nd Floor, 100, Queen Street West



PROVINCE OF CANADA,
District of Montreal.

IN THE QUEEN'S BENCH.

In Appeal from Superior Court, Montreal.

THE HARBOUR COMMISSIONERS OF MONTREAL.

(Plaintiffs in the Court below).

vs.

ANDREW MCMASTER.

(Defendant in the Court below).

Respondent.

APPELLANTS' CASE.

The Judgment rendered in the Court below, and now appealed from, was based upon the ground that the Master of a Vessel is not liable for damage done to a wharf in the Harbour of Montreal, the Vessel being in charge of a licensed Branch Pilot, whom the law obliges the Master or owner to employ. In other words, that the fact of there being a Pilot on board, and in charge of the Vessel, commences the Master from all responsibility in such a case of collision, on the ground that the law makes it imperative to employ such Branch Pilot in the Navigation of Montreal, and thereby takes away the responsibility of the Master or owner.—The present Appeal is brought—like with a view of recovering the amount of damage, which is small, than for the purpose of settling this very important question.

The Action was brought against the Master of one of the Ocean Steamers, of which Messrs. Allan & Co. are the agents, to recover the amount of damage occasioned by the Steamer having struck against the Island wharf in the Harbour of Montreal, the Plaintiffs having themselves expended the amount sought to be recovered in repairing the wharf after the damage done by the collision.

The Defendant pleaded several Pleas.

The First—That during the whole trip from Quebec to Montreal, and at the time of the collision, the Defendant had on board a Branch Pilot, "as by Law and the Statute in such case made and provided he was bound to have, who, at the time of the accident, had the sole charge, order and control of the said Steamer, and such Branch Pilot had, at the time of the collision mentioned in the Plaintiffs' Declaration, the command, control and direction of the said Steamer, and the working, steering and Navigation thereof, and by means of the presence, the said Defendant was, at the time of such pretended collision, under no liability whatever for and in respect of the working and Navigation of the said Vessel, either towards the Plaintiffs or any other person or body public; and if, during the time the said Steamer was in under the control of such Branch Pilot, the said Vessel struck against and caused damage to the Plaintiffs' wharf, as set forth in the Plaintiffs' Declaration, be the said Defendant is in no way legally bound to pay therefor, or indemnify the Plaintiffs against any such loss and damage, as is falsely pretended in and by the Plaintiffs' Declaration."

The Second Plea, sets up that the Plaintiffs were bound and obliged by law to keep the Channel leading into the Port free and open, for the passage of Vessels, but failed to keep the Channel safe and navigable, and that at the time in question "the said Channel was, as the Defendants afterwards ascertained, obstructed, impeded, and dangerous, for the passage of Vessels. That if any injury was done to the wharf the same was attributable to the neglect and fault of Plaintiffs in not keeping the Channel sufficiently dredged and open for the passage of Vessels."

The Third Plea sets up that the wharf projected into the stream; that every precaution was taken to avoid collision, "but owing to the violence and force of the current, and the

"power of the wind assisting, the said Steamer was driven by the force and oblique direction of the stream, on and against the said Island wharf, and if any damage was done to the said wharf, which the Defendant expressly denies, it was not through any fault of the said Defendant, his Officers or crew, but owing partly to the projection of the said wharf so far into the said River St. Lawrence, and partly to the irresistible violence of the current bearing on and against the said wharf, and the power of the wind assisting, and the same was the effect of and was occasioned by a *force majeure* for which the Defendant was not and cannot be held responsible."

Fourth Plea: Defense au fonds en fait.

It will be manifest from the Record, and it was admitted and stated by the Honorable Judge in rendering the Judgment appealed from, that the *second* and *third* Pleas were not supported by proof, but that on the contrary it appeared that the day when the collision happened, was fine without wind, and the Channel in its usual state, and amply sufficient for the passage of such Vessels. The amount of damage is also clearly made out, so that the points for the determination of the Court will be seen to be questions of Law.

First.—Does the Law oblige owners or Masters of Ocean Vessels, navigating the St. Lawrence from Quebec to Montreal, to take Pilots?

Second.—In case of a Pilot being on board and in charge of the Vessel, are owners or Masters from that fact, by Law, discharged from liability in cases of collision?

Third.—Or, is it not necessary for the owner or Master, pleading exemption from liability, to allege and prove in order to exonerate themselves that the collision was caused by the fault or incapacity of the Pilot in charge?

As to the first point, the provisions of Law so far as regulated by the Legislation of the Province will be found in the following Statutes:—

45 Geo. III, cap. 12, Sections 6, 18.

2 Vict. cap. 19, " 18, 17.

12 Vict. cap. 114, " 11, 53, 54, 55.

12 Vict. cap. 117, " 5, 14, 19, 21, 41.

13 and 14 Vict. cap. 96.

14 and 15 Vict. cap. 101.

The Imperial Pilotage Acts, to which reference may be made, are the following:—

52 Geo. III, cap. 59.

6 Geo. IV, cap. 125.

Merchants' Shipping Act of 1854.

The L. C. Act of 1805, 45th Geo. III, cap. 12, sect. 1 incorporates "The Master, Deputy Master and Warden of the Trinity House of Quebec," three out of the seven persons mentioned to be residents of *Montreal*; and enacts (sect. 6) that it shall be lawful for the Governor to appoint, by warrant "or branch under his hand and seal at arms, fit and proper persons to be Branch Pilots *for and below the Harbour* of Quebec, and *other fit and proper persons* to be Branch Pilots *for and above the said Harbour*," and (by sect. 13) "that if the Master of any Ship or Vessel coming to the Harbour of Quebec," (except coasting Vessels or River Craft, &c., mentioned in the proviso,) "not having on board a Pilot, shall refuse to receive on board and employ any Branch Pilot who shall offer to go on board, and serve as such in the River St. Lawrence, the Master of such Vessels shall pay to such Branch Pilot half Pilotage to the Harbour of Quebec, from the place at which such Pilot shall have so offered. Provided always that no Master of any coasting Vessel or River Craft, when employed within any part of the Gulf or River St. Lawrence, or when bound to or from the Labrador Fisheries, shall be obliged to take or receive on board a Pilot, anything herein contained to the contrary, notwithstanding."

The 2 Vict. cap. 49, amended the previous Act of 1805, and incorporated "The Master, Deputy Master and Wardens of Trinity House of *Montreal*," with jurisdiction from Port Neuf upwards, and with power (sect. 6) to make By-laws, amongst other things, "for the government and regulation of the Pilots *for and above the Harbour of Quebec*." This Statute (sect. 19) imposed a penalty of £20 on any person, not being a Pilot, acting as such, and a penalty of £10 on any Branch Pilot, acting as such, whilst suspended and deprived of his Branch.

The 12 Vict. cap. 114 is the first Act that enacted (sect. 53) "that the Master of each Vessel leaving the Port of Quebec for a Port out of this Province shall take a Branch Pilot, to conduct such Vessel under a penalty equal to the Pilotage of the Vessel, which penalty shall go to the decayed Pilots fund," and (by sect. 54) "That the Master of every Vessel coming from a Port out of the Province, and not having a Branch Pilot on board, shall, on entering the Port of Quebec, under a penalty of £10, hoist the Union Jack at the fore top-mast head, and leave it so hoisted every day, from day light to dark, until boarded by a

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"Branch Pilot." The 55th section provides that the Master of any Vessel arriving within the Port of Quebec, and perceiving a Pilot boat with a flag should lie to, and give the Pilot charge of his Vessel, under a penalty not exceeding £10 over and above the full Pilotage.

This is the Act now in force regulating Pilotage at Quebec, but it is of no force above the upper limits of that Port; the regulation and government of Pilots licensed as such for the Port of Quebec, being, by sect. 4, sub. section 13, vested in the Quebec Trinity House.

The Act in force as to the Port of Montreal is the 12 Vict., cap. 117, the 5th section of which vests in the Montreal Trinity House the power of making By-laws for Pilots "for and above the Harbour of Quebec." These Pilots must (sect. 14) obtain certificate from the Trinity House Montreal, and by section 15, must have served 5 years "in the River Navigation between Quebec and Montreal," and by sections 16 and 17, may be suspended, and dismissed, or reinstated also by the Trinity House of Montreal. Sect. 19 imposes a penalty on any Pilot refusing to take charge of a Vessel "upon being required by the Master or other person having the command of such Ship or Vessel, &c.;" and for quitting any Vessel "after he has been engaged to Pilot the same, before the service has been performed for which he has been hired."

It is submitted that the only clause in the statute, or in our Provincial Legislation which can be considered as giving countenance to the idea of compulsory pilotage on the St. Lawrence above the Harbour of Quebec is the 21st sec., 12 Vic., cap. 117.

On examination of this section, it will be found to provide penalties in three cases:

1.—On any person, not being a Branch Pilot, "conducting or piloting any vessel, not being a River craft, steamer, barge or lighter, engaged in the navigation between Quebec and Montreal only, for hire or otherwise, on the River St. Lawrence, between the basin at Port Neuf and the Harbour of Montreal."

2.—On Pilots as such whilst suspended or deprived of his Branch.

3.—On the Master of any Vessel, not being such river craft, &c., "hiring, engaging, or employing any person not being a Branch Pilot, and for not requiring him to exhibit his branch to him, before such hiring or engagement."

These provisions impose penalties on persons not being Branch Pilots, acting as such; on suspended Pilots, for acting; or on Masters hiring any person not being a Pilot; but they do not, like the Merchant Shipping Act of 1854 (sec. 353), declare "that the employment of Pilots shall continue to be compulsory," nor impose a penalty "on every Master who, either himself pilots such ships, without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to Pilot her." Nor does it, like the 354th section of that Act, enact that "the Master of every ship carrying passengers, &c., &c. shall employ a qualified Pilot to pilot his ship, and if he fail so to do, he shall for every offence incur a penalty not exceeding £100." It may be mentioned further, that the By-Laws of the Trinity House, Montreal, now in force, adopted 2nd April, 1853, and sanctioned under the Act referred to, on the 3rd May, 1853, do not enact or seem to sanction compulsory pilotage, although numerous regulations are therein made respecting Pilots.

It is submitted, therefore,—

That by our Provincial statutes, pilotage is not compulsory for the part of the St. Lawrence in question. And

That the Imperial legislation regulating pilotage was never in force in Canada.

This view is sustained by the Honorable Mr. Black—see Stuart's Vice-Admiralty cases, page 195.

The present Imperial Act in force on the subject, "The Merchant Shipping Act of 1854," is divided into eleven parts—the part regulating the pilotage being the 8th part. The first clause of that part (330th section of the Act) is in the following words: "The 8th part of this Act shall apply to the United Kingdom only." In the same 8th part is the following section, which enacts the special exemption, also applicable to the United Kingdom only, and which cannot be held as of force in Canada, by the Courts, without express legislation on the subject:

"Sect. 388.—No Owner or Master of any Ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such a Ship, within any district where the employment of such Pilot is compulsory by law."

The analogous provision in the 55th section of the previous English Statute, 6 Geo. IV., chap. 125, may be also quoted, as the cases to be found in the books turn chiefly on the provisions of this section:

"Sect. 55.—That no Owner or Master of any Ship or Vessel shall be answerable to any person or persons whatsoever, from or by means of any neglect, default, incompetency or incapacity of any licensed Pilot acting in charge of any such Ship or Vessel, under or in pursuance of any of the Provisions of this Act, where and so long as such Pilot shall be duly qualified to have charge of such Ship or Vessel, or where or so long as no duly qualified Pilot shall have offered to take charge thereof."

"If any injury shall be done to any of the wharves, piers or other works in the said harbor constructed or to be constructed, by any Tonnage, Or by the negligence or wantonness of the crew thereof, while in the execution of their duty, or by the orders of their superior officers it shall be lawful for the said Corporation to make such Tonnage, and decide how much the injury or damage shall have been required by the Master of such vessel to fully satisfy shall have been given by the said Master, to pay such amount for the injury and costs as may be awarded in any suit which may be brought against him for the same, and he is hereby declared to be liable to the said Corporation for any such damage."

The same similar provision is the one which Art. 100, of the Constitution of the Province of Ontario, as it applies to the Province of Ontario.

It is submitted that, by the Common Law of England, as well as of this country, the party injured by collision has his remedy, by Action, not only against the Owner, but the Master. In all cases the Master is liable directly for his own default. One the master of the Appellant's vessel is liable against the Vessel, but it gives an Action against the Master for "any injury" to any Vessel by any Vessel. It makes the Master responsible for what some of the witnesses call the "act of the Ship," or the "default of the Ship." It is sufficient to render him responsible that the injury is done by his Vessel. The statute further makes him liable for the consequences and even the maintenance of the crew while sailing in the execution of his duty. The intention of the statute would seem to be that the Maritime Commission should have the means of recovering the loss or value of the property to any injured vessel, by proceedings against the Vessel or the Master, without being driven to a suit against the Owner. It is certainly expedient to have which should through their recovery for such injury, simply because it was caused by a Vessel having a Placard issued.

As to the facts of the case in this case, it will be seen that the Respondent failed to prove that the injury was caused by any of the witnesses alleged, by the confession or lack of the Appellant, by the fact of the Vessel, or by any other evidence, or that the alleged default and dangerous nature of the vessel, was only discovered after the injury was done. They also failed in the attempt to prove that the Vessel was rotten and worthless, and that the injury was directly caused, and not by the fault of the Vessel. The reverse of all this is proved—that there was no fault on the part of the Appellant—that the day was fair, with a light wind, and the vessel was seaworthy—that there was somewhat more than ordinary depth of water—and that there was ample room for the Steamer to pass. It will be found that in cases of collision of a Vessel under way with a Ship at anchor, or with a Wharf or other fixed object, there is held to be sufficient evidence of fault of one or the other of the Vessel which collides, simply by the fact of collision. In the case of a Steamer, the justice of the Rule is still more apparent; more especially when, as in this instance, the Steamer is a regular trader, and in smooth water navigation. But it is necessary to decide how far the Respondent could have been liable in case it had been clearly proved that the injury was caused by fault on the part of the Respondent.

In reaching the judgment below, the Honorable Judge made no allusion to the nature of the Harbor Act referred to, nor was any opinion expressed as to whether the Imperial Statute as to Harbors was or was not in force in Lower Canada, nor was any Provincial Statute cited as establishing compulsory Pilots.

The Appellant's grounds have been stated, notwithstanding the small amount involved in this particular case, as being the whole matter up before this Court, in order to obtain a decision for their guidance in future.

A. & W. ROBERTSON,
Attorneys for Appellants.

MONTREAL, 12th April, 1886.

